NO. 22320

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY PEMBERTON,

Appellant,

vs.

JAMES A. DAVIS,

Appellee.

BRIEF FOR APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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JURISDICTION

This is an appeal from a Decision on Review of an Order of the Referee in Bankruptcy, made by the United States District Court for the District of Nevada, which limited the lien claim of appellant Pemberton to the sum of $272.04, reversed the order of the Referee which had allowed an additional $250.00 for storage charges and upheld the denial of the claim of Pemberton to the sum of $2,291.54.

The proceedings were initiated before the Referee in Bankruptcy by the Trustee's Application to Determine Claim of Pemberton Flying Service, and the Referee's Opinion and Decision was filed June 19, 1967, limiting the claim to a total of $522.04

(Tr. of Rec. pp. 17-22), as opposed to Pemberton's claim of $2,291.54. The matter came before the District Court on a Petition for Review (Tr. of Rec. pp. 23-25), and the District Court limited the claim to $272.04 (Tr. of Rec. pp. 27-38). The Notice of Appeal was filed September 20, 1967 (Tr. of Rec. p. 39).

Jurisdiction of the lower court was conferred by Bankruptcy Act §§ 1 and 2(10) (11 U.S.C. §§ 1 and 11 (10)). Jurisdiction on the Appeal is based on Bankruptcy Act §24 (11 U.S.C. 47).

STATEMENT OF THE CASE

The Findings of Fact, filed by the Referee June 19, 1967 (Tr. of Rec. pp. 19, 20) set forth the following facts as to which there is no real argument, namely:

William Garnick, president of Midwest Livestock Company, delivered a Cessna aircraft to Pemberton Flying Service, on August 30, 1963, for repairs. These repairs, amounting to a total of $272.04, were completed in 10 days, or about September 9, 1963. On September 19, 1963, the Sheriff of Kern County, California, acting under the authority of a writ of attachment issued by the Kern County Superior Court in a civil action filed by Bill Harris and others against Garnick, Midwest and others (Tr. of Rec. p. 52), took possession of the aircraft, and verbally instructed Pemberton to hold the aircraft in storage. Pemberton continued to hold the aircraft until January 21, 1965, when the Sheriff released the attachment (Exhibit A, Tr. of Rec. p. 46), which date was the

same date on which the Trustee in the debtor proceedings commenced proceedings to have the attachment lien declared null and void (Tr. of Re. pp. 2-5).

The aircraft remained in storage with Pemberton after January 21, 1965 and until April 19, 1965, when the aircraft was finally sold by the Trustee, and the purchaser took possession. The total time during which the aircraft was in storage from the time of attachment to delivery was 577 days, and the reasonable value of the storage would be the sum of $3.50 per day.

A creditor's petition in involuntary bankruptcy had been filed against Midwest Livestock Commission Company on October 22, 1963 (Tr. of Rec. p. 88), Midwest filed a Petition for Proceedings for the Reorganization of the Corporation, under Chapter X of the Bankruptcy Act on April 17, 1964 (Tr. of Rec. p. 89), and a Trustee for the debtor was appointed April 24, 1964 (Tr. of Rec. p. 89). No officer of the debtor made any attempt to take possession of the aircraft, nor did any officer of the bankruptcy court make any attempt to take charge of the aircraft until January 21, 1965 (Tr. of Rec. p. 2).

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in holding that Pemberton had no statutory lien rights for reasonable storage charges for the periods of time during which the aircraft was left with him in storage, that is, for the period of 490 days, from September 19,

1963 to January 21, 1965, when he held it at the direction of the Kern County Sheriff, and for the further period of 87 days, from January 21, 1965 to April 19, 1965, when he held it for disposition by the bankruptcy court.

QUESTIONS PRESENTED

1. When an aircraft is seized under a valid writ of attachment by an appropriate officer, and such officer places the aircraft in storage, does the person providing such storage have a lien for the storage charges which is valid as against the owner of the aircraft?

2. Does the person providing storage of an aircraft which was placed with him in storage by one having authority to do so, have a lien for the reasonable value of storage for the period of time that the trustee in a subsequent bankruptcy proceeding involving the aircraft's owner allows the aircraft to remain in storage?

ARGUMENT

I

A STATUTORY LIEN FOR STORAGE CHARGES ARISES IN FAVOR OF THE PARTY WITH WHOM AN AIRCRAFT IS PLACED BY A SHERIFF WHO HAS TAKEN LAWFUL POSSESSION OF THE AIRCRAFT UNDER A WRIT OF ATTACHMENT.

Section 1208.61 of the Code of Civil Procedure of the State of California provides:

> "Subject to the limitations set forth in this chapter, every person has a lien dependent upon possession for the compensation to which he is legally entitled for making repairs or performing labor upon, and furnishing supplies or materials for, and for the storage, repair, or safekeeping of, any aircraft, also for reasonable charges for the use of any landing aid furnished such aircraft and reasonable landing fees."

The primary question of law for resolution on this appeal is the question of whether or not a keeper is entitled to a lien for storage of a property such as an airplane when the storage was done at the direction of a police officer under a writ of attachment. There are few, if any, cases involving lien rights for the storage or repair of aircraft but because of the similarity in the language of the statutes governing the lien rights of a garage keeper

and the lien rights of one who repairs or stores aircraft, the cases under a garage keeper's lien are in point.

One California case comes closest to a direct answer to the question presented in this appeal and this is the case of Bentinck v. Menotti, 97 Cal. App. 412, 275 Pac. 850. In the Bentinck case, Mr. Bentinck was a defendant in a civil action and his car was picked up on a writ of attachment. The levying officer placed the car in the garage where it remained for approximately three (3) months, and the constable was then directed to release the car. As the opinion states, the constable notified the garage keeper to deliver the automobile to either Mr. Bentinck or his attorney upon payment of the garage keeper's fees for storing and keeping the automobile. Mr. Bentinck refused to pay storage charges and brought an action in claim and delivery; in this action, the trial court held against him, giving judgment in favor of the constable and the garage keeper. The Court of Appeal affirmed the ruling, stating:

> "Was the appellant obligated to pay the storage fees before he could claim possession of his automobile? We think it is clear that the obligation to pay the garage fees rests upon the appellant; the automobile being lawfully in the possession of the respondents by virtue of the attachment and the placing of the same in the garage for safekeeping, the storage costs became a lien upon the automobile (Civil Code 3051, 3057)."

The issue presented on this appeal was the subject of an annotation in 48 A. L. R. 2d 912, where the note writer points out that there is a division of authority, some cases holding that where the motor vehicle involved was stored with the garage keeper at the direction of a public officer, sheriff or marshal, the courts have held that the garage keeper was not entitled to a lien (citing cases in Alabama, Iowa, New York, South Dakota, Utah and Missouri); the note then continues with the statement that, however, in a number of cases, a garage keeper was allowed a lien for services for storage of a motor vehicle which had been incurred at the request of a public officer (citing cases in Alabama, California, Mississippi, Louisiana, Tennessee and Oklahoma).

An examination of the cases cited for the proposition that the lien is not allowed, indicates that these generally involve a situation where the public officer who had directed the storage had no authority to direct the storage. Thus, in Lewis v. Best-by-Test Garage, 200 Iowa 1051, 205 N. W. 983, the bailiff levied execution on a truck owned by the plaintiff but levy was made on the assertion that the truck belonged to another man of similar name. Plaintiff, Lewis, gave immediate notice of ownership and the execution was released, and as the opinion notes, "The evidence as to the ownership of the truck is not in dispute". The appellate court then concluded that the garage man had no lien as against the plaintiff.

In Auto Dealers Discount Corp. v. Budd, 242 App. Div. 37, 272 N. Y. S. 893, the defendant sheriff stored the car without legal authority, hence the garage had no lien; in Brown v. Ace Motor Co.,

30 Ala. App. 479, 8 So. 2d 585, the officer ordered a disabled car towed away and stored and the appellate court held that the officer had no such authority, hence no garageman's lien was created.

On the other hand, the cases cited in the annotation in 48 A. L. R. 2d 912, for the proposition that a garage owner is allowed a lien for services for storage of a motor vehicle incurred at the request of a public officer involve citations where the sheriff was acting under proper authority, such as a writ of attachment. Among the cases cited are Grace v. Wooley, 26 Ala. App. 83, 174 So. 799, where the owner had brought the car to the garage for repairs and an attachment was levied upon the vehicle while it was in the garage. The lien rights were then upheld.

In McJunkin v. Chattanooga Garage, 166 Tenn. 457, 63 S. W. 2d 517, the sheriff had levied an attachment on a car and the conditional vendor presented a claim. The lien was upheld as valid, the court stating that, "The possession of the officer, being lawful, carried with it the same right the owner had to do with the car what was necessary for its protection and preservation."

We find it difficult to distinguish the case at bar from the Bentinck v. Menotti case, and as we have indicated, the Bentinck case adopted the same approach as that in McJunkin v. Chattanooga Garage, 166 Tenn. 457, 63 S. W. 2d 517. That is, that where the possession of the levying officer was lawful, that possession carried with it the same right that the owner had to protect and preserve the car.

As we have pointed out in another portion of this brief,

the aircraft was brought in for repairs and after the repairs were completed, the levy of attachment was made and from that date until the levy of attachment was released, the aircraft was held in storage at the direction of the sheriff, the party having lawful possession of the same.

II

PEMBERTON'S LIEN RIGHTS ARE NOT CURTAILED BY THE EFFECT OF §2892 OF THE CALIFORNIA CIVIL CODE.

Section 2892 of the California Civil Code states:

> One who holds property by virtue of a lien thereon, is not entitled to compensation from the owner thereof for any trouble or expense which he incurs respecting it, except to the same extent as a borrower, under sections eighteen hundred and ninety-two and eighteen hundred and ninety-three.

The District Court for the District of Nevada placed reliance upon this section, and the recently decided case of Owens v. Pyeatt, 248 Cal. App. 2d _____, 57 Cal. Rptr. 100, 248 A. C. A. 987, the only reported case interpreting §2892. The Owens case held that a garageman who had made repairs on an automobile was not entitled to reasonable storage charges for the period during which he retained possession of the car in exercise of his lien for the cost of repairs. We respectfully submit that the case is distin-

guishable upon the facts.

In Owens v. Pyeatt, plaintiff Owens was a garageman who had made repairs to defendant Pyeatt's car, and, after completion of the repairs, refused to release the car to Pyeatt until Pyeatt had signed a release required by Pyeatt's insurance carrier. Owens eventually sued for the cost of repairs plus reasonable storage, and prevailed in the trial court, but upon appeal, the California Court of Appeal reversed, stating:

> "It also appears plaintiff retained possession of the automobile to protect their garagekeepers lien . . . A garageman who retains possession of an automobile repaired by him in the exercise of his right to claim a lien thereon is not entitled to the reasonable value of the storage thereof during the time he keeps it in his possession (Civil Code §2892; see also Moss v. Odell, 141 Cal. 335). Plaintiffs' claim against Pyeatt for storage is not supported by the evidence."

In the case presently here for review, Pemberton did not retain possession of the aircraft in exercise of his right to claim a lien for the repairs; on the contrary the evidence is undisputed that the repairs had been completed and was being held for delivery to the owner when the Kern County Sheriff placed the property under lien of attachment arising out of a civil action in which Pemberton was in no way involved. By its own terms, California Civil Code

§2892 applies to: "One who holds property by virtue of a lien thereon . . ." and Pemberton was not holding the aircraft by virtue of the assertion of a repairman's lien, but instead was holding it in storage at the direction of the Sheriff.

All parties recognized this to be the case; for example in the first petition filed by the Trustee having any reference to the aircraft, the Petition to declare liens null and void filed January 21, 1965 (Tr of Rec. pp. 2-4) the prayer for relief was:

> 1) That this Court determine said attachment of BILL HARRIS and MALCOLM HARRIS doing business as HARRIS BROS. to be null and void and discharge the said aircraft from the lien thereof, and that the Sheriff of Kern County California be directed to deliver said aircraft to the Trustee herein. (Tr. of Rec. p. 4)

and the Order made upon this petition was generally in accord with that prayer (Tr. of Rec. pp. 8-11).

As further indication of the manner in which the aircraft was held in storage, Pemberton submitted statements to the Sheriff for storage fees (Exhibits B, Tr. of Rec. pp. 47, 48).

We respectfully submit that the facts here do not present a case within §2892 of the California Civil Code nor within the rule of law announced in Owens v. Pyeatt, supra.

III

PEMBERTON IS ENTITLED TO STORAGE LIENS FOR THE PERIOD FROM JANUARY 21, 1965 TO APRIL 19, 1965, WHILE THE AIRCRAFT WAS LEFT IN HIS POSSESSION BY THE TRUSTEE.

The facts are undisputed that the aircraft was left in Pemberton's care after the release of the attachment and until its eventual sale, a period from January 21 to April 19, 1965 apparently because the Trustee in the debtor proceedings preferred to do so. Clearly, this storage was not within the prohibition of Civil Code §2892 as storage resulting because Pemberton was holding it for his repair lien. At the very least, Pemberton is entitled to storage charges for this 87 day period, at the rate determined to be reasonable by the Referee, the rate of $3. 50 per day, or a total of $304. 50.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order, denying appellant's claim of $2, 291. 54 and allowing it only in the sum of $272. 04, should be reversed, and the cause remanded with instructions to allow the claim in full, as a lien against the sale proceeds.

Respectfully submitted,

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By KENNETH H. BATES

Attorneys for Appellant,
Roy Pemberton

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Kenneth H. Bates

KENNETH H. BATES